PD-0265-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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Case Number: PD-0265-18

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/7/2018
DEANA WILLIAMSON, CLERK

MARC DAVENPORT,
Appellee

V.

THE STATE OF TEXAS,
Appellant

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, NINTH DISTRICT
AT BEAUMONT, TEXAS
CASE NUMBER: 09-17-00125-CR

221st District Court, Montgomery County, Texas
Trial Court Cause No. 16-06-07318-CR

APPELLEE'S BRIEF ON THE MERITS

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Statement of the Case

This case challenges the constitutionality of section 551.143 of the Texas Government Code. Appellee believes that section 551.143 is unconstitutionally overbroad and vague.

On June 24, 2016, Appellee, Marc Davenport, was indicted for Conspiracy to Circumvent the Texas Open Meetings Act (TOMA) under Government Code 551.143.[1] Although not a member of a governmental body, Appellee was charged as a party to the conspiracy with language in the indictment tracking Penal Code section 7.02(a)(2). On March 22, 2017, Appellee filed a motion to join Appellee Craig Doyal's Motion to Dismiss the Indictment.[2] On March 27, 2017 the trial court began a pre-trial hearing on the Motion to Dismiss the Indictment that concluded on April 3, 2017.[3] On April 4, 2017, an order was signed granting the Motion to Dismiss the Indictment.[4] On April 19, 2017, the State of Texas filed a notice of appeal of the order granting the Motion to Dismiss the Indictment.[5]

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[1] CR 5.
[2] CR 50-54.
[3] CR 61.
[4] CR 61.
[5] CR 63.

On February 7, 2018, the Ninth Court of Appeals reversed and remanded the trial court's order.[6] A motion for rehearing was not filed by either the Appellee or the State. The Appellee filed a petition for discretionary review.

On June 20, 2018, this Court granted Appellee's petition for discretionary review.

[6] *State v. Davenport*, No. 09-17-00125-CR, 2018 WL 753357, at *3 (Tex. App.—Beaumont Feb. 7, 2018, pet. granted) (mem. op., not designated for publication).

Issues Presented

I. Whether section 551.143 of the Texas Government Code is unconstitutionally overbroad.

II. Whether section 551.143 of the Texas Government Code is unconstitutionally vague.

Statement of the Facts

This case arises out an indictment against Appellee Marc Davenport for his alleged involvement with Appellees Craig Doyal and Charlie Riley, both Montgomery County Commissioners, regarding the contents of the potential structure of a November 2015 Montgomery County Road Bond.[7] On March 29, 2017 a pre-trial hearing began surrounding the constitutionality of the Texas Open Meetings Act.[8] None of the witnesses testified regarding the facts leading to the indictment.

Appellees called six witnesses during the hearing. These witnesses included Alan Bojorquez, who has been an attorney for 20 years and has worked for the Texas Municipal League, as a city attorney, and as a private attorney advising clients on the Texas Open Meetings Act (TOMA).[9] Mr. Bojorquez testified that it is difficult in complying with section 551.143 because he believes that the statute is not well written and creates uncertainty for members of a governmental body.[10] The next

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[7] CR 19.
[8] RR Vol. 2, p. 1.
[9] RR Vol. 2, 23:18-19, 24:18-25:4, 28:18-29:24.
[10] RR Vol. 2, 34:9-11, 40:22-24, 67:20-69:2.

person to testify was Charles Jessup, the mayor of Meadows Place, Texas.[11] Mr. Jessup testified he has been a mayor for ten years and that TOMA is a confusing statute and that he tries to avoid conversations so that he is not in violation of having a walking quorum but is not sure how that works.[12] He is not sure if he is going to be prosecuted for talking to other council members so he does not talk with them even though it would help him do his job as mayor.[13] Mr. Jessup's problems with the statute are not that he has any desire to keep information from the public but rather knowing if he is in violation of section 551.143.[14] Eric Scott, mayor of Brookshire, Texas, testified that despite going to many hours of government education classes, the uncertainty in determining what is criminal conduct under section 551.143 stops good governance.[15] He testified that section 551.143 keeps him from having conversations with more than two people because he does not want to appear to be violating the statute.[16]

On day two of the pre-trial hearing Jennifer Riggs testified that she believes that section 551.143 is unconstitutional because it restricts speech and is not narrowly tailored to further a legitimate government purpose.[17] Ms. Riggs supports

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[11] RR Vol. 2, 222:13-19.
[12] RR Vol. 2, 226:11-14.
[13] RR Vol. 2, 230:9-17.
[14] RR Vol. 2, 240:19-241:5.
[15] RR Vol. 2, 259:19-260:3, 261:13-16.
[16] RR Vol. 2, 270:4-25.
[17] RR Vol. 3, 38:10-15.

open government but the statute causes more restrictions and confusion than what the legislature intended and hurts government by restricting communication between government officials and constituents.[18] Also, she testified that whether a person has extensive experience with the statute or has only minimal education on the statute they still have the same questions over what is considered a violation under section 551.143.[19] Next, James Kuykendall, mayor of Oak Ridge North, Texas, testified that section 551.143 keeps him from talking to other members of the city council due to fear of violating the statute.[20] The last Appellee witness, Charlie Zech, is a private attorney that serves as general counsel or city attorney for various governmental entities.[21] Mr. Zech testified that he believes that section 551.143 limits the ability of government officials to discuss issues of public business outside of an open public meeting and that reasonable people have to guess what section 551.143 means.[22]

The State called two witnesses during the hearing. James Rodriguez, a former Houston City Council member testified that TOMA did not hinder his work as a city council member or restrict his ability to communicate with other city council members or constituents.[23] Mr. Rodriguez also testified that he erred on the side of caution when talking to other council members because of the way the statute is

[18] RR Vol. 3, 38:16-24.
[19] RR Vol. 3, 75:2-22.
[20] RR Vol. 3, 111:15-112:3, 117:4-7.
[21] RR Vol. 4, 9:19-10:5.
[22] RR Vol. 4, 30:12-18.
[23] RR Vol. 5, 14:20-15:10.

worded.[24] Joel White, an attorney who teaches seminars on the Texas Open Meetings Act testified that chapter 551 is in general a disclosure statute and section 551.143 is a content-neutral statute.[25]

Summary of the Argument

Section 551.143 of the Texas Government Code restricts speech based on content and is subject to strict scrutiny. Section 551.143 is unconstitutionally overbroad because it restricts a substantial amount of protected speech and is not narrowly tailored to achieve a compelling state interest. Further, the statute is unconstitutionally vague because ordinary reasonable people have to guess at the meaning of the statute. While TOMA seeks to make sure there is open government, the effect of section 551.143 is that government officials avoid communication and limit their engagement with other public officials and their constituents to make sure they are not subject to criminal prosecution.

[24] RR Vol. 5, 18:5-10.
[25] RR Vol. 5, 67:1-14.

Argument

I. Section 551.143 of the Texas Government Code is unconstitutionally overbroad because it applies to speech rather than conduct and does not satisfy strict scrutiny.

The trial court correctly dismissed the indictment in this case because section 551.143 of the Texas Government Code is a content based restriction on speech that does not survive the strict scrutiny standard established by the United States Supreme Court. The court of appeals held that section 551.143 is directed at conduct rather than speech because it targets the act of conspiring to circumvent TOMA not the content of the deliberations.[26] This conclusion of the court of appeals led to the application of the incorrect standard of review when analyzing the constitutionality of section 551.143. Rather, because section 551.143 is not implicated unless the content of the deliberations involves an issue within the jurisdiction of the governmental body or public business, the statute is a content based restriction on its face and strict scrutiny applies.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.[27] A speech regulation targeted at a specific subject matter is content based even if it does not

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[26] *State v. Davenport*, No. 09-17-00125-CR, 2018 WL 753357, at *2 (Tex. App.—Beaumont 2018, pet. granted) (mem. op., not designated for publication) (citing *State v. Doyal*, 541 S.W.3d 395, 401 (Tex. App.—Beaumont 2018, pet. granted). The Beaumont Court of Appeals used the same reasoning in *Doyal* to reverse the trial court's order in Appellee's case.

[27] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

discriminate among viewpoints within the subject matter.[28] Content based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.[29] A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the idea contained" in the regulated speech.[30]

Section 551.143 is not a content-neutral statute. The Court of Appeals, citing *Asgeirsson v. Abbott* as support, concluded that section 551.143 is content neutral because a statute that appears content based on its face may still be considered content neutral if it is justified without regard to the content of its speech.[31] This position comes from *City of Renton v. Playtime Theatres, Inc.*, where in the context of a public forum, the government can impose reasonable restrictions on the time, place, or manner of protected speech provided that the restrictions are justified without reference to the content of the regulated speech.[32] The restrictions must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information.[33] The Court of Appeals' rationale for finding the statute content neutral is founded in the belief that it

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[28] *Id.* at 2230.
[29] *Id.* at 2226.
[30] *Id.* at 2228.
[31] *Doyal*, 541 S.W.3d at 400.
[32] 475 U.S 41, 47–48 (1986).
[33] *Id.*

promotes transparency in government, and even though the statute may be content based on its face, it can still consider section 551.143 content neutral and subject to a rational basis scrutiny standard of review rather than strict scrutiny.[34]

This analysis is incorrect because as *Reed* points out, there must first be a determination as to whether a statute is content-neutral or content-based before turning to the law's justification or purpose.[35] An innocuous justification cannot transform a facially content-based law into one that is content-neutral.[36] The phrase "content based" requires a court to consider whether a particular regulation of speech on its face draws distinctions based on the message a speaker conveys.[37]

Section 551.143 is a content-based statute because the law only applies if a certain topic is being discussed: any issue within the jurisdiction of the governmental body, public business, or public policy. Section 551.143 includes language aimed at members "meeting in numbers less than a quorum for the purpose of secret deliberations."[38] A "deliberation" is "a verbal exchange during a meeting between a quorum of a governmental body and another person concerning an issue within the jurisdiction of the governmental body or any public business."[39] The term "meeting" includes a deliberation between a quorum of a governmental body and another

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[34] *See Asgeirsson v. Abbott*, 696 F.3d 454, 461–62 (5th Cir. 2012).
[35] *See* 135 S. Ct. at 2228.
[36] *Id.*
[37] *Id.*
[38] Tex. Gov't Code § 551.143(a).
[39] Tex. Gov't Code § 551.001(2).

person during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.[40] In order to review whether this statute content-based or content-neutral, it must be determined what subject matter is being discussed. If the subject matter being discussed includes a matter within the jurisdiction of a governmental body, public business, or public policy then section 551.143 applies and therefore the law is content-based under a First Amendment analysis because of the "topic discussed or the idea or message expressed."[41]

The justification for section 551.143 is that it ensures that TOMA is complied with because the penalty for violating the act will keep people from conducting public business behind closed doors. Appellee does not argue that TOMA as a whole is unconstitutional and open government is certainly a noble goal for the statute to ensure. However, the justifications for open government do not make the statute content-neutral.[42] These justifications were used by the court in *Asgeirsson v. Abbott* to find that section 551.144 of the Texas Government Code is content-neutral.[43]

Asgeirsson only interpreted section 551.144 and did not review the statute at issue in this appeal. The court in *Asgeirsson* found that section 551.144 was content-neutral because the purpose of the section is to make government more transparent

[40] Tex. Gov't Code § 551.001(4)(A).
[41] *See Reed*, 135 S. Ct. at 2227.
[42] *See id.* at 2228.
[43] *Asgeirsson*, 696 F.3d at 461–62.

by allowing the public to have access to government decisionmaking.[44] Further, it has been argued that because section 551.143 is a disclosure statute like that of section 551.144, it should be subject to intermediate scrutiny.[45] Section 551.144 makes it an offense to have a closed meeting when that meeting is not allowed under the statute.[46] Section 551.143 is not a disclosure statute like section 551.144 but rather section 551.143 restricts speech related to matters within the jurisdiction of a governmental body, public business, or public policy. Reliance on *Asgeirsson* in light of *Reed*, does not make section 551.143 a content-neutral statute.

When the government seeks to restrict and punish speech based on its content the usual presumption of constitutionality is reversed.[47] Content based regulations are presumptively invalid and the government bears the burden to rebut that presumption.[48] The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[49] To satisfy strict scrutiny, a law that regulates speech must be necessary to serve a compelling state interest and be narrowly drawn.[50] A law is narrowly

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[44] *Id.*
[45] State's Brief at 41, *State v. Davenport*, No. 09-17-00125-CR, 2018 WL 753357 (Tex. App.—Beaumont 2018, pet. granted) (mem. op., not designated for publication).
[46] Tex. Gov't Code § 551.144.
[47] *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013).
[48] *Id.*
[49] *Id.*
[50] *Id.*

drawn if it employs the least restrictive means to achieve its goal and there is a close nexus between the government's compelling interest and the restriction.[51]

Section 551.143 is unconstitutional under strict scrutiny analysis because it does not serve a compelling government interest. Even if it did serve a compelling government interest the law is not narrowly drawn to achieve that interest. The central justification for TOMA is open and transparent government. The belief is that transparency in government allows the public to see how decisions are made and who is making them. While this is certainly a valid justification it does not rise to the level of a compelling government interest.

There are no other reported cases of criminal prosecution under section 551.143 in Texas. It would be expected that if the danger of deliberations outside of open meetings were of such a compelling interest then there would have been other instances of criminal prosecution.

It is also difficult to argue that the legislature sees TOMA as furthering a compelling government interest because the legislature exempts itself from TOMA. Section 551.003 makes TOMA applicable to the legislature except as specifically permitted in the Texas Constitution.[52] Under article three, section 11 of the Texas Constitution, each house of the legislature can determine the rules of their own

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[51] *Id.*

[52] Tex. Gov't Code § 551.003.

proceedings.[53] The House and Senate in the Texas legislature can do this if they choose.[54] It is common for the legislature to suspend their rules.[55] This is done because it helps members of the legislature do their work in order to determine what bills will be supported and which ones will not. If the Texas legislature does not find TOMA to be necessary for conducting business in their sessions it is difficult to find that section 551.143 is a compelling interest for other governmental bodies.

Further, section 551.143 is not narrowly tailored to achieve the potential compelling interest of open government under TOMA, but rather it is overbroad. When considering whether a statute is overbroad under the First Amendment, a statute is facially invalid if it prohibits a substantial amount of protected speech in relation to the statute's plainly legitimate sweep.[56] The declaration that a law is overbroad is done out of the concern that the threat of enforcement of that law will deter or chill constitutionally protected speech, especially when the overbroad law imposes criminal sanctions.[57] The statute must prohibit a substantial amount of protected expression and the danger that the statute will be unconstitutionally applied must be realistic and not based on fanciful hypotheticals.[58]

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[53] Tex. Const. art. III, § 11.
[54] *See, e.g.*, *In re Texas Senate*, 36 S.W.3d 119, 120 (Tex. 2000).
[55] RR Vol. 3, 57:17-24.
[56] *Ex parte Lo*, 424 S.W.3d 10, 18 (Tex. Crim. App. 2013) (citing *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003).
[57] *Hicks*, 539 U.S. at 119.
[58] *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015).

Section 551.143 is not narrowly tailored and is overbroad because it infringes on a substantial amount of protected speech. The U.S. Supreme Court has recognized categories of unprotected speech.[59] Speech integral to criminal conduct is not a protected category of speech.[60] However, speech under section 551.143, is not integral to any other traditional criminal conduct. It is speech about an issue within the jurisdiction of the governmental body or public business, not speech as part of conduct that forms a criminal act. Further, because the language of section 551.143 is not sufficiently clear it creates a situation where there is a substantial amount of protected speech that can subject a member or members of a governmental body or a member of a governmental body and another person to criminal prosecution.

The first step in an overbreadth analysis is to construe the challenged statute because it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.[61] The Court of Appeals did not perform this analysis to determine whether section 551.143 reaches too far. There are many counties and municipalities throughout the State of Texas and there are innumerable situations where protected speech may become subject to criminal prosecution because section 551.143 reaches too far.

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[59] *U.S. v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing obscenity, defamation, incitement, and speech integral to criminal conduct as categories of unprotected speech).
[60] *Sanchez v. State*, 995 S.W.2d 677, 688 (Tex. Crim. App. 1999) (bribery and extortion).
[61] *Stevens*, 559 U.S. at 474.

Section 551.143 has the effect of reaching a substantial amount of protected speech because every member of a governmental body has constituents with which they may have conversations. These conversations can cause a member of the governmental body to be wary of what they discuss with a constituent because they may not know who else that constituent has talked to or whether the constituent is relaying the member's position on the topic to another member of the governmental body. It is the consequence of a law going too far to subject a member to criminal prosecution when the member would instead be simply communicating about a constituent's concern.

To illustrate that section 551.143 reaches a substantial amount of speech, two Amici Curie brief's were filed in support of Petitioner in this case.[62] The Texas Municipal League, the Texas City Attorney's Association, the Texas Association of Counties, and the Texas Conference of Urban Counties believe that this statute affects a large number of members of a governmental bodies throughout the state of Texas and that they need guidance from this Court.[63] These organizations believe

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[62] Brief for Texas Municipal League, et al. as Amici Curie Supporting Petitioner, *Doyal v. State*, No. PD-0254-18, *available at* http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=081d2179-ebd8-49c2-aea3-4605edf07eec&coa=coscca&DT=BRIEF&MediaID=7f5a677d-84fd-422b-9d2d-15c4d91b13e7; Brief for Texas Ass'n of School Boards, et al. as Amici Curie Supporting Petitioner, *Doyal v. State*, No. PD-0254-18, *available at* http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=fcc5b862-d1a6-4f7a-bf62-b4abf7818ebb&coa=coscca&DT=BRIEF&MediaID=96e7a72b-e089-47f0-a367-7461cbf7e78b.

[63] Brief for Texas Municipal League, *supra* note 19, at 1.

that guidance from this Court is of enormous practical consequence for the 254 counties in Texas, 1,200 incorporated cities, 7,000 people that serve as mayors and councilmembers, and 1,270 people that serve as county judges and commissioners.[64] In a practical sense, it is a statute that affects a substantial amount of protected speech every day.

In addition, a concerned citizen who speaks with a member of a governmental body could also be subject to prosecution. If a citizen decides that they are going to speak with members of their local city council about an issue that is important to them, those conversations could lead to the possibility of a prosecutor deciding that the citizen was helping those council members get around TOMA. It creates a situation where it discourages communication between members of a governmental body and the people the members represent. That is surely not the goal of TOMA and section 551.143 is too broadly written in order to accomplish transparency in government.

The intent of TOMA could be accomplished in less restrictive ways when considering section 551.143. First, the intended violations that section 551.143 seeks to prevent could be deterred using a civil penalty rather than subjecting a person to jail time and having the charge become part of their criminal record. Second, the legislature could add a section similar to the section included in section 551.144 that

[64] Brief for Texas Municipal League, *supra* note 19, at 1-2.

allows the governmental body to use their reliance on a court order, attorney general opinion or attorney opinion as a defense to a violation. Third, section 551.144 could be used as a deterrent without the need for 551.143. Section 551.144 would still include the possibility of jail time for someone prosecuted under that section. Lastly, the legislature could amend the statute to add language stating that meeting in numbers less than quorum for the purpose of sequential or multiple secret deliberations to make it more easily identifiable what is considered a violation of section 551.143.[65] It is clear that as written section 551.143 has good intentions but is not narrowly tailored to keep the statute from applying to a substantial amount of protected speech and is therefore unconstitutionally overbroad.

II. Section 551.143 of the Texas Government Code is unconstitutionally vague.

Criminal statutes, like section 551.143 here, must be clear in at least three ways.[66] First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited.[67] Second, laws must provide explicit standards for those that apply them.[68] A vague law impermissibly delegates basic policy matters to police officers, judges, and juries for resolution on an ad hoc and subjective basis with the dangers of arbitrary and discriminatory application.[69]

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[65] *See* RR Vol. 3, 4:25-41:4.
[66] *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996) (en banc).
[67] *Id.* (citing *Grayned v. Rockford*, 408 U.S. 104, 108 (1972).
[68] *Grayned*, 408 U.S. at 108.
[69] *Id.* at 109.

Lastly, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression.[70] Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[71] The testimony of the witnesses at the pre-trial hearing show that section 551.143 does exactly what a vague law is not supposed to do. It inhibits members of a governmental body from performing their public duty not because they are trying to avoid complying with TOMA but rather because they choose not to speak with other members for fear of criminal prosecution under TOMA.

During the pre-trial hearing in this case, the trial court heard from multiple witnesses from each side. Appellee's called three attorneys, Alan Bojorquez, Jennifer Riggs, and Charlie Zech, who all discussed the difficulty of interpreting section 551.143 despite extensive experience with the statute.[72] Appellee's also called three mayors, Charles Jessup, Eric Scott, and James Kuykendall, who are subject to section 551.143. Each testified that they have difficulty understanding what is considered a violation of the statute but that they do their best to avoid a

[70] *Long*, 931 S.W.2d at 287.
[71] *Grayned*, 408 U.S. at 109.
[72] RR Vol. 2, 68:17-69:2, 75:13-22, Vol. 4, 30:12-18.

situation where they could be in violation.[73] The fear of being punished with jail time leads them to not engage in conversations with fellow council members.[74]

The State called two witnesses, James Rodriguez, a former Houston City Council member and Joel White, a private attorney with a background in First Amendment law and TOMA. Mr. Rodriguez testified that the statute did not limit his ability to communicate with other city council members.[75] However, he also testified that he erred on the side of caution when speaking to other council members.[76] Mr. White testified that he believes the statute is not difficult to understand and is not unconstitutional.[77]

Clearly there is a disagreement as to the meaning of section 551.143. If attorneys who have extensive background in TOMA have difficulty understanding what is and what is not a violation, then those who have much less experience but who are elected officials will have difficulty understanding the statute and also have a higher chance of facing criminal prosecution. A public official has to be very careful about making sure they are following the law because criminal charges can end a person's political career. A private citizen, such as Appellee in this case, will

[73] RR Vol. 2, 226:11-24, Vol. 2, 261:13-16, Vol. 3, 111:15-112:17.
[74] RR Vol. 2, 230:9-231:4, Vol. 2, 266:11-16, Vol. 3, 117:8-19.
[75] RR Vol. 5, 14:20-15:10.
[76] RR Vol. 5, 18:1-16.
[77] RR Vol. 5, 67:1-14, 74:14-16.

not know they are in violation of section 551.143 when attorneys who have spent a significant part of their career interpreting TOMA cannot clearly state what is a violation under the statute.

Further, the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys, believe that section 551.143 is unconstitutionally vague and hinders the ability of members of school boards to conduct public business.[78]

The court in *Asgeirsson* states that claims of vagueness in TOMA comes from the complexity of the statute and that just because a statute is complex does not make it unconstitutionally vague.[79] In fact, according to the court, TOMA is less complex because of the vast body of law that the provides the standards for interpretation.[80] However, there are no other cases that have interpreted the constitutionality of section 551.143 that would provide guidance on determining what the boundaries are when trying to identify a violation under the section.

In this case, the Court of Appeals relied on an attorney general opinion that used civil cases to guide its interpretation of section 551.143.[81] A person of ordinary intelligence, is not going to have that attorney general opinion nor the case law to help them make sense of section 551.143 when trying to figure out what is prohibited

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[78] Brief for Texas Ass'n of School Boards, *supra* note 19, at 12.
[79] *Asgeirsson*, 696 F.3d at 466–67.
[80] *Id.* at 466.
[81] *Doyal*, 541 S.W.3d at 402 (citing Tex. Att'y Gen. Op. No. GA-0326 p. 3 (2005)).

and what is not. Because the statute is not sufficiently clear, this creates a chilling effect on speech regarding matters within the jurisdiction of the governmental body and public business because members of governmental bodies and citizens do not know what is lawful and not lawful.[82]

Because there is no guidance on what is considered a violation this has also led to a chilling effect on communication for members of a governmental body as well as to the advice given by attorneys to their clients when discussing what is a violation under section 551.143. Section 551.143 is not sufficiently clear to give people of ordinary intelligence a reasonable opportunity to know what is prohibited and is unconstitutionally vague.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellee respectfully requests this Court to reverse the judgment of the court of appeals and reinstate the ruling of the trial court dismissing the indictment against Appellee.

[82] *See Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983).

Respectfully submitted,

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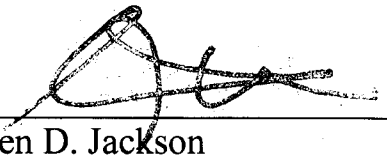
By: 

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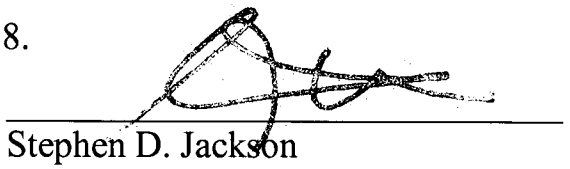
Certificate of Service

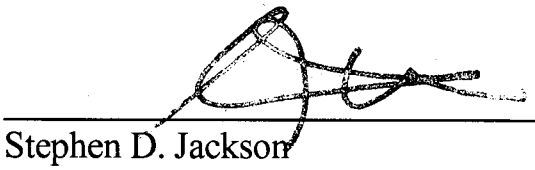
I certify that a copy of the above and foregoing Appellee's Brief was sent by electronic service, to counsel representing the State of Texas and the State Prosecuting Attorney on the 6th day of August, 2018.



Stephen D. Jackson

Certificate of Compliance

I certify that a copy of the above and foregoing Appellee's Brief has a word count of 4,347 after excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1).



Stephen D. Jackson